TANG TUNG THIAN & ANOR

v.

UNITED ORIENTAL ASSURANCE SDN BHD

HIGH COURT SABAH & SARAWAK, KUCHING
MUHAMMAD KAMIL AWANG J
[CIVIL APPEAL NO: 12-14-1999-II]
23 NOVEMBER 1999

INSURANCE: *Motor insurance - Non-disclosure of material facts - That vehicle was already involved in an accident - Uberrimae fidei - Whether insurer may avoid contract - Proposal form filled by agent - Whether knowledge of agent imputed to insurer*

INSURANCE: *Accident insurance - Burden of proof - Whether insured bears burden of proving that peril was covered by policy - Failure to plead that loss by theft was an insured peril - Failure to produce policy - Only cover note exhibited - Whether insured failed to discharge burden*

The appellants took out a comprehensive motor insurance policy in respect of their already damaged vehicle. The proposal form was filled by a person alleged to be an agent of the respondent insurers. The answers provided in the proposal form failed to disclose that the vehicle had been involved in an accident. Later on the appellants lodged a police report that the vehicle had been stolen and filed a claim against the respondent for the loss of the vehicle. The appellants however failed to upkeep their instalment payments for the vehicle and the plaintiff financier commenced an action against them. The appellants then issued a third party notice against the respondent for indemnity against liability to the full extent of the plaintiff's claim against them.

Held:

[1] A contract of insurance is a contract *uberrimae fidei;* the non-disclosure of material facts by the appellants gave the respondent a right to avoid the contract.

[2] The appellants did not adduce evidence to discharge the burden of proving that loss by theft was a peril insured against or covered by the terms of the policy.

[3] The respondent was caught by surprise as the allegation of forgery was not set out in the pleadings.

[4] There was no evidence that the respondent withheld or suppressed evidence by not calling certain witnesses. As such s. 114(g) Evidence Act 1950 was not applicable.

[Appellants' appeal dismissed.]

Case(s) referred to:
American Home Assurance Co v. Nalin Industries Sdn Bhd [1993] 3 CLJ 319 ***(refd)***
Asia Hotel Sdn Bhd v. Malayan Insurance (M) Sdn Bhd [1992] 2 CLJ 1185 ***(refd)***
Chia Yan Tek & Anor v. Ng Swee Kiat & Anor [1997] 4 CLJ 535 ***(refd)***
Glicksman v. Lancashire & General Assurance Co Ltd [1926] Lloyd LR 69 ***(refd)***
Goh Chooi Leong v. Public Life Assurance Co Ltd [1964] MLJ 5 ***(refd)***
Munusamy v. PP [1987] 1 MLJ 492 ***(refd)***
School Man v. Hall [1951] Lloyd's Rep 139 ***(refd)***
Syarikat Tai Yuen Supermarket (Tawau) Sdn Bhd v. Merchantile Insurance Sdn Bhd & Anor [1994] 1 CLJ 228 ***(refd)***
Tan Kang Hua v. Safety Insurance Co [1973] 1 MLJ 6 ***(refd)***
Tuang Aik (Sarawak) Sdn Bhd v. Arab Malaysian Eagle Assurance Bhd [1996] 2 CLJ 134 ***(refd)***

Legislation referred to:
Evidence Act 1950, s. 114(g)
Subordinate Courts Rules 1980, O. 14 rr. 13(1), 14(1)(b)

Other source(s) referred to:
General Principles of Insurance Law, ER Hardy Ivamy, 5th edn, p 146
Halsbury's Laws of England, 4th edn, reissue, vol 25, p 215
Mac Gillivray & Parkinson on Insurance Law, 6th edn, p 318

For the appellant - Fabian Sigar; M/s John Shek & Co
For the respondent - Leonard Shim; M/s Reddi & Co

Reported by Izzaty Izzuddin

JUDGMENT

Muhammad Kamil Awang J:

By this action, the plaintiff claimed against the defendants/appellants for arrears of instalments under a hirepurchase agreement. Judgment was entered against the appellants. By a third party notice dated 8 April 1989, the appellants were claiming from the respondent for an indemnity against the liability to the full extent of the plaintiff's claim against the appellants, as well as the balance insured sum from the total insured sum of RM34,000.

Facts Of The Case

On 9 April 1985 the appellants entered into a hire purchase agreement with the plaintiff for a finance to purchase an Isuzu 4D Trooper registration no. KM 8006 Q (the vehicle) and it was registered in the name of Allan Trading Co., the appellants' firm. The vehicle was at the material time, insured by East West Insurance, and the policy had expired on 1 April 1986.

The vehicle whilst driven by the 2nd appellant, was involved in a self accident near Bintangor sometime in September 1985, and it was repaired at a workshop at Bintangor and the costs of repair was claimed from East West Insurance.

When the vehicle was in the workshop, the appellants took out a comprehensive insurance policy in respect of the vehicle, *vide* the Certificate No. K 66/501/000251/86 (the policy) from the respondent. In the Proposal Form (exh. TP9), it bears the firm's name, Allan Trading Co. and DW3 affirmed that the stamping on the Proposal Form was Allan Trading Co. In the Proposal Form, the relevant questions (p. 142 Appeal Record) are as follows:

> Q5: Please give details of all your past and present Motor Insurances together with policy Nos.
>
> Ans: No.
>
> Q9: Has the vehicle to be insured been involved in any accident in the past, within your knowledge while in your or any previous owners possession?
>
> Ans: Unknown.

And the appellants declared:

> Declaration by Proposer (Section 44A)
>
> I/We to the best of my/our knowledge hereby confirm that the statements contained in this proposal form are true and correct and I/We have not concealed, mis-represented or mis-stated any material fact.
>
> I/We agree that the statements and declaration contained in this proposal form shall be the basis of the contract of insurance with the Company and are deemed to be incorporated in this contract.

These facts are not in dispute.

On 15 September 1986, the appellants lodged a report with the police stating that the vehicle had been stolen, and on the same day the appellants lodged a claim against the respondent for the loss of the vehicle.

The appellants submitted that the third party/respondent had never denied any liability pertaining "that theft was not covered by such policy. In the defence of the third party they admitted that they are liable for the sum claimed in the third party notice. By such admission theft is included in such policy."

The respondent submitted that the appellants had not produced the insurance policy in respect of the vehicle, all it had was a cover note. The onus of the proof was on the appellants to prove that there is an insurance policy and that the item for loss of vehicle is covered by the policy. See *American Home Assurance Co v. Nalin Industries Sdn Bhd* [1993] 3 CLJ 319 (SC) and *Tuang Aik (Sarawak) Sdn Bhd v. Arab Malaysian Eagle Assurance Bhd* [1996] 2 CLJ 134.

A contract of insurance is a contract *uberrimae fidei.* There must be honest disclosure of material facts. If there is non-disclosure of fact, the contract may be avoided. Although the respondent in its defence did not plead that theft is not covered by the policy, nevertheless the said contract of insurance is vitiated by the non-disclosure of material facts and as such the learned Sessions Court judge was correct in stating that the respondent was not bound by the contract.

In *Goh Chooi Leong v. Public Life Assurance Co Ltd* [1964] MLJ 5, Gill J (as he then was) at p. 7 said:

> It is trite law that the contract of insurance is a contract *uberrimae fidei* which can be avoided for non-disclosure of material facts.

Viscount Dunedin in the House of Lords' case of *Glicksman v. Lancashire & General Assurance Co Ltd* [1926] Lloyd LR 69; [1926] All ER 161; [1927] AC 139, at p. 71 said:

> Then I came to the law of it. The law has often been stated, but perhaps it is just as well to state it again. A contract of insurance is denominated, a contract *uberrimae fidei.* It is possible for persons to stipulate that answers to certain questions shall be the basis of the insurance, and if that is done then there is no question as to materiality left, because the persons have contracted that there should be materiality in those questions; but quite a part from that and alongside of that there is a duty of no concealment of any consideration which would affect the mind of the ordinary prudent man in accepting the risk.

Those observations were adopted by LJ Cohen in *School Man v. Hall* [1951] Lloyd's Rep. 139, at p. 143 said:

> So, I think, applying those observations here, while the insurers have stipulated that the answers to the fifteen questions "shall be the basis of the contract", that only has the effect of preventing any argument as to the materiality of those questions should dispute arise, but it does not relieve the proposer of his general obligation at common law to disclose any material which might affect the risk which was being run, or which might affect the mind of the insurer as to whether or not he issue a policy.

See *Asia Hotel Sdn Bhd v. Malayan Insurance (M) Sdn Bhd* [1992] 2 CLJ 1185; [1992] 2 MLJ 615.

In *Mac Gillivray & Parkinson on Insurance Law* (6th edn) at p. 318, it is stated:

> An applicant for motor insurance ought to make full disclosure of any accidents in which he had been involved, whether he was driving on his own account or on behalf of some other person. This disclosure should extend to the accident record of any driver who to his knowledge is going to drive the car.

General Principles of Insurance Law (5th edn) by ER Hardy Ivamy at p. 146 states:

> The fact that a proposer has been involved in a previous accident is usually material.

It is clear from the evidence that the appellants had breached the contract for non-disclosure of material facts. As this is a contract *uberrimae fidei*, non-disclosure of a material fact gives the insurance company the right to avoid the contract. The respondent in this case was entitled to avoid the contract with the appellants. Thus the appellants had failed in their claim. Now I will deal with each of the grounds raised in the appeal.

Ground 1

The appellants submitted that the trial judge had erred in law and fact for holding that "failure to plead loss by theft is covered by insurance" and to adduce evidence that it was covered in the term of the policy, the court could dismiss the defendant's claim when there was evidence to show that the appellants had never received the said policy from Everrise Insurance Co., who was the agent of the respondent.

The appellants contended that a third party notice had been served on the respondent. In the defence of the respondent, it had never denied any liability that theft was not covered by such policy. It had admitted liability to the appellants for the sum claimed in the third party notice. By such admission theft was included in such policy.

The respondent submitted that this is a finding of law and fact based on undisputed fact. The burden of proving loss (ie, theft) was a peril insured against lies on the insured (appellants). See *American Home Insurance Co v. Nalin Industries Sdn Bhd* [1993] 3 CLJ 319, where the Supreme Court held, *inter alia*, that:

> The respondent (insured) bears the burden of establishing that its claim falls within the peril insured against. However, the onus of proving that the event comes under a certain exemption lies on the party repudiating the claim, the appellant.

In *Tuong Aik (Sarawak) Sdn Bhd v. Arab-Malaysian Eagle Assurance Bhd* [1996] 2 CLJ 134, I said that:

> The fundamental issue for the Court to decide is whether or not the plaintiff has discharged the onus of proving that the loss was caused by a peril insured against.

Based on the third party notice dated 8 April 1989, it cannot be disputed that the appellants had failed to plead the following material facts:

a) that loss by theft is a peril insured against, and

b) that loss by theft is covered by the policy.

The policy certificate no. 66/501/000251/86 issued by the respondent but the appellants had failed to produce the said policy during the trial as they alleged they did not receive the policy. Only a Cover Note (exh. AB1) was produced which did not contain any terms and conditions of the policy. DW3 testified that the policy was a "comprehensive or first party" policy, and it remained unsubstantiated.

It was not disputed that the appellants did not take up the policy with the respondent. In the absence of the policy, there is no evidence adduced by the appellants to prove on a balance of probabilities that loss by theft of the insured vehicle is a peril insured against or covered by the terms of the policy.

In *Tuong Aik (Sarawak) Sdn Bhd's case (supra)*, I said that:

> Where the Court is left in doubt upon the evidence whether the loss was due to a peril insured against or to some other cause not covered by the marine policy, the plaintiff had failed to discharge the burden which lies upon it of establishing that the loss is covered by the marine policy and the insurance company is entitled to judgment.
>
> This is sufficient to dispose of the case in the defendants' favour and they are entitled to judgment on this ground.

The trial judge was correct that there was no evidence to show that theft was a peril insured against, and there was no evidence that it was covered by the insurance policy. The appellants had not discharged this burden.

Ground 2

Learned trial judge erred in law and fact in holding that "the defence submission that the knowledge of the agent in filling up the proposal form is imputed to the owner is unsubstantiated" as she failed to consider that the said agent was the sale representative/agent who has the full authority to act on behalf on the third party/respondent.

The appellants submitted that the agent and the Everrise Sdn Bhd were the agent of the respondent and these were stated by TPW1. Everrise Sdn Bhd was the agent of the respondent and was authorised by the respondent to act on its behalf, in issuing the cover note, policy and receiving premium on policy issued by the respondents. TPW1 had confirmed that his agent Everrise not only had the authority to issue cover note but also was responsible in the preparation and dispatch of policy to and for the third party. Therefore the knowledge of the agent can be imputed as the knowledge of the third party.

DW3 testified that the proposal Form (exh. TP9) was filled in by an agent of Everrise Insurance Co., one Ling Ah Siong. Appellants submitted that the knowledge as to the untruth of the answers to questions 5 and 9 of the proposal form should be imputed to the respondent.

The respondent averred that TPW1 was the Kuching Manager of the respondent and he testified that Everrise operated business in Kuching only and had no agent in Bintangor in 1986. The agency code no. 228 in the Cover Note exh. AB1, and the code no. 275 in the Proposal Form (exh. TP9) were not the agency code of the respondent's authorised or registered agent. As Ling Ah Siong was not an agent of the respondent the knowledge of Ling Ah Siong in filling the proposal form could not be imputed to the respondent. Therefore the trial judge was correct in holding that the knowledge of the agent in filling up the proposal form was imputed to the owner was unsubstantiated.

Furthermore, DW3 testified that he merely stamped the appellants' chop on a blank proposal form, and asked Ling Ah Siong to fill in the answers in exh. TP9 for him and did not give any details to the agent. These are mere allegations and not pleaded in the third party notice. Nor did the appellants reply to the respondent's defence dated 11 December 1989. These allegations of material facts were not pleaded by the appellants as required by O. 14 r. 13(1) of the Subordinate Court Rules 1980.

DW3 alleged that the signature at the bottom of Proposal Form exh. TP9 was not his and therefore it was a fraud or forgery which was not pleaded under O. 14 r. 14(1)(b) of Subordinate Court Rules 1980, which states:

> A party must in any pleading subsequent to a statement of claim plead specifically any matter, for example, performance, release, any relevant written law relating to limitation, fraud or any fact showing illegality –
>
> (a) ...
>
> (b) which, if not specifically pleaded, might take the opposite party by surprise; or
>
> (c) ...

In *Asia Hotel Sdn Bhd v. Malayan Insurance (M) Sdn Bhd* [1992] 2 CLJ 1185; [1992] 2 MLJ 615, the court held:

> I am of the view that all the material facts complained of as not having been pleaded, should have been pleaded and it has to follow that all evidence relevant to the unpleaded facts must be disregarded and I do disregard the same.

The fact that DW3 did not sign exh. TP9 was raised for the first time in his testimony on 18 January 1999, that is more than 10 years after the letter of repudiation dated 10 March 1988, exh. TP10, completely caught the respondent by surprise. The appellants had failed on this ground.

Ground 3

The trial judge had erred in law and fact to hold that "... I am satisfied that there is misrepresentation when the defendants gave false answers to the said two questions in the proposal form." The appellants submitted that DW3 said that the agent of Everrise Insurance Co. did not pose the said two questions to him when he bought the insurance from the said agent.

The respondent submitted that the false answers to questions 5 and 9 in exh. TP9 amount to misrepresentation of material facts. In *Tan Kang Hua v. Safety Insurance Co* [1973] 1 MLJ 6, the insured falsely stated in the proposal form that the proposer had not made a previous claim for damage to the insured vehicle under any motor policy. The Federal Court held that "the learned trial judge was correct in holding that there had been non-disclosure and misrepresentation in the proposal form relating to material particulars."

The learned trial judge did not accept DW3's testimony (at p. 91 Appeal Record) that he did not sign the proposal form because no one asked him to do so, and that he chopped on the blank form the company stamp

because Ling asked him to do so. The appellants had failed to plead in the third party notice or in the proposal form that (exh. TP9) was in contravention of O. 14 r. 13(1) Subordinate Courts Rules 1980. It appears that the allegations of the appellants are an afterthought.

TPW1 testified that the policy was issued based on the answers in the proposal form (exh. TP9) and if the respondent had known that the vehicle was under repair in the workshop at the time the policy was issued, the respondent would have not taken the risk in the policy. TPW1's evidence was never challenged by the appellants. In *Halsbury's Laws of England* (4th edn reissue) vol 25, at p. 215 states:-

> The effect of non-disclosure or misrepresentation ... is that the insurers have the right to repudiate the contract ...
>
> The remedy is not normally available where there has been a mere non-disclosure there must be a misrepresentation, although innocent misrepresentation will suffice.

I find that the learned trial judge was correct in holding that there was a misrepresentation made by the appellants in the proposal form.

Ground 4

The trial judge erred in law and fact in holding that the failure by the third party to call Everrise Insurance Co. and the said agent does not invoke s. 114(g) of the Evidence Act as contended by the appellants.

The appellants submitted that there was evidence to show that Everrise did all the acts pertaining to the policy. TPW1 had confirmed that Everrise and/or its agent in Bintangor accepted the proposal form and issued the policy. These two were not called as witnesses, and the appellants were deprived of the right to question them. No explanation was given for non-calling of the witnesses. The trial judge had erred in law in not invoking s. 114(g) of the Evidence Act. Without these witnesses, the whole of defence failed.

The respondent submitted that the burden of proof was on the appellants to adduce evidence to support their contention that exh. TP9 was filled up and signed by the agent of Everrise (ie, Ling Ah Siong) and it was up to the appellants to call them. In *Syarikat Tai Yuen Supermarket (Tawau) Sdn Bhd v. Merchantile Insurance Sdn Bhd & Anor* [1994] 1 CLJ 228 the court held that:

> There was no direct evidence at all that Sadong or someone from Sadong had written the answers to questions 9 and 11. The burden of proving Sadong wrote the answers to questions 9 and 11 rests with the plaintiff since the plaintiff so asserts.

The principle in s. 114(g) is clear that if the person withholding the evidence or suppressing the evidence, then the court may invoke s. 114(g), that is an adverse inference may be drawn against him for not producing the evidence. See *Munusamy v. Public Prosecutor* [1987] 1 MLJ 492 (FC). In the instant case, there is no evidence that the respondent withheld or suppressed the evidence by not calling Everrise and Ling Ah Siong as witnesses. According to TPW1, the respondent had terminated the agency of Everrise in 1993 and Ling Ah Siong was unknown to the respondent. It was the appellants who brought up the name of Ling Ah Siong for the first time at the trial. On the evidence, the learned trial judge was correct in not invoking s. 114(g) of the Evidence Act.

Ground 5

The trial judge erred in law and fact to hold that "... I am not satisfied that the defendants have established their claim on the balance of probabilities."

The appellants contended that they have proved that the vehicle was insured by the respondent, that the vehicle was stolen and that the appellants had reported the loss of the vehicle in reasonable time. Thus the appellants had proved on the balance of probabilities their claim against the respondent.

The trial judge is the best person to decide based on the evidence before her, which of the stories, the appellants or the respondent's, to believe. She had the benefit of seeing and observing the witnesses and their demeanour and had rightly come to the conclusion on the facts that on the balance of probabilities, the appellants had failed to prove their claim.

The Court of Appeal in *Chia Yan Tek & Anor v. Ng Swee Kiat & Anor* [1997] 3 MLJ 717 said that:

> Based on the evidence presented before him, the trial judge was entitled to make his own assessment as to where the truth lay. ...
>
> In the words of Lord Diplock in *Tan Chow Soo v. Ratna Ammal* [1969] 2 MLJ 49 at p 50:

> ... this was a classic example of a case in which the decision depends entirely upon which parts of the conflicting testimony of the witnesses who gave oral evidence before the learned judge, at the trial, were to be believed. An appellate court, particularly where there is no full transcript of the oral evidence, is in a far less advantageous position to decide an issue of credibility than the trial judge who heard the evidence in full and observed the witnesses as they gave it, noting their pauses and their hesitations and any visible signs of confidence or embarrassment.

The approach an appellate court should adopt in a case of this nature has been stated repeatedly. But we must express our own inability to find a clearer statement of the appellate function than that formulated by Lord Shaw of Dunfermline in his speech in *Clarke v. Edinburg Tramways Co* [1919] SC (HL) 35 at p. 36. This is how he put:

> When a judge hears and sees witnesses and makes a conclusion or inference with regard to what on balance is the weight of their evidence, that judgment is entitled to great respect, and that quite irrespective of whether the trial judge makes any observations with regard to credibility or not. I can of course quite understand a Court of Appeal that says that it will not interfere in a case in which the judge has announced as part of his judgment that he believes one set of witnesses, having seen them or heard them, and does not believe another. But that is not the ordinary case of a cause in a court of justice. In the courts of justice, in the ordinary case, things are more evenly divided: witnesses without any conscious bias towards a conclusion may have in their demeanour, in their manner, in their hesitation, in the nuance of their expressions, in even the turns of the eyelid, left an impression upon the man who saw and heard them, which can never be reproduced in the printed page. What in the circumstances, thus psychologically put, is the duty of the appellate court? In my opinion, the duty of an appellate court in those circumstances is for each judge of it to put himself, as I now do in this case, the question: am I – who sit here without the advantages, sometimes broad and sometimes subtle, which are the privilege of the judge who heard and tried the case – in a position, not having those privileges, to come to a clear conclusion that the judge who had them was plainly wrong? If I cannot be satisfied in my own mind that the judge with those privileges was plainly wrong, then it appears to me to be my duty to defer to his judgment.

On the evidence as a whole the appellants had failed to prove its case, and the learned trial judge had correctly dismissed it. There is nothing in the evidence that warrant my intervention in the case. In the circumstances, I would dismiss the appeal with costs to the respondents to be taxed unless agreed.